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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 ABKCO MUSIC, INC., et al.,

4 Plaintiffs, New York, N.Y.

5 v. 15 Civ. 4025 (ER)

6 WILLIAM SAGAN, et al.,

7 Defendants.

8 -----x  
9 September 3, 2015  
10 10:22 a.m.

11 Before:

12 HON. EDGARDO RAMOS,

13 District Judge

14 APPEARANCES

15 LOEB & LOEB LLP  
16 Attorneys for Plaintiffs  
BY: BARRY ISAAC SLOTNICK  
17 CHRISTIAN D. CARBONE  
TAL EFRIAM DICKSTEIN

18 WINSTON & STRAWN LLP (NY)  
19 Attorneys for Defendants  
BY: MICHAEL S. ELKIN  
DANIEL GUISBOND

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1                 THE CLERK: In the matter of ABKCO Music versus Sagan,  
2 counsel please state your names for the record.

3                 MR. SLOTNICK: Barry Slotnick for the plaintiffs, of  
4 Loeb & Loeb, with Christian Carbone and Tal Dickstein.

5                 THE COURT: Good morning.

6                 MR. ELKIN: Good morning, your Honor. Michael Elkin,  
7 Winston & Strawn. I have with me Dan Guisbond from my firm.  
8 We represent the defendants.

9                 THE COURT: Good morning to you as well.

10                 This matter is on for an initial conference. So let  
11 me start with Mr. Slotnick. Tell me what your case is all  
12 about in a nutshell, if you will.

13                 MR. SLOTNICK: Sure. Plaintiffs are copyright owners.  
14 They own musical compositions, typically the work that  
15 underlies the recorded performance or the live performance of a  
16 musical composition. The defendants operate numerous websites  
17 which exploit commercially those musical compositions without  
18 licenses from any of the plaintiffs. That in a nutshell is  
19 what the case is about.

20                 Many of these recordings are recordings of live  
21 concerts that took place as long ago as, I guess, the 1960s and  
22 '70s, some of which were recorded apparently by Bill Graham,  
23 the late impresario and concert promoter.

24                 THE COURT: Was that the same Bill Graham that was the  
25 subject of the fair use case?

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1                   MR. SLOTNICK: Bill Graham was the subject of a fair  
2 use case with respect to --

3                   THE COURT: The publishing of a book.

4                   MR. SLOTNICK: -- images not of music but of images  
5 relating to posters. That is the Bill Graham we are talking  
6 about.

7                   THE COURT: OK.

8                   Mr. Elkin.

9                   MR. ELKIN: Yes, your Honor. The principal defendant  
10 here is Bill Graham Archives, which is owned by Norton LLC.  
11 Mr. Sagan is also listed as a defendant as the majority  
12 shareholder.

13                  Our clients purchased these archival recordings and  
14 footage of concerts in a number of transactions where they paid  
15 tens of millions of dollars for these assets. They operate  
16 their business, your Honor, based on various licenses that are  
17 recognized by law and the parties. There is a dispute, though,  
18 between us as to whether or not those licenses are sufficient.  
19 We believe that they are; they believe that they are not. And  
20 in a nutshell that's what the case is about.

21                  We have some counterclaims for declaratory judgment  
22 with respect to whether the activities they claim are  
23 infringing or not infringing. We have a counterclaim for  
24 defamation, as well, in respect of a statement that was made at  
25 the outset of a case by the head of the trade association who

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1 sponsored this lawsuit.

2 THE COURT: Is there any dispute that plaintiffs own  
3 the compositions of the works at issue?

4 MR. ELKIN: Not at this stage, your Honor. We haven't  
5 had any discovery, but I don't have any reason to believe that  
6 they do not own the copyrights at issue.

7 THE COURT: From whom did you purchase the licenses?

8 MR. ELKIN: We acquired the physical property,  
9 representations that these rights were owned by the various  
10 companies -- one of them was Clear Channel, this big -- which  
11 is now Live Nation -- other companies that own assets, like  
12 King Biscuit Flower Hour, which is a syndicated radio show.

13 THE COURT: Biscuit Flower Hour?

14 MR. ELKIN: Yes. King Business Flower Hour.

15 THE COURT: King Business Flower Hour.

16 MR. ELKIN: It goes back a number of years and I  
17 hardly remember it, but I do have some passing distant memory  
18 of it.

19 But the way it works, as your Honor will learn in this  
20 case, with respect to musical compositions, the actual  
21 downloading impinges on what's called the right of  
22 reproduction. Those rights can be obtained either through a  
23 clearinghouse, which is referred to as Harry Fox, or through a  
24 compulsory licensing scheme under the copyright statute. With  
25 regard to the actual streaming itself, it impinges on the right

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1 of public performance. And there are rights that you can  
2 obtain through SESAC, BMI, ASCAP, the three performing rights  
3 societies.

4 There is also at issue in this case something called  
5 the synchronization right, which is the ability to synchronize  
6 the musical composition with the video. We believe that those  
7 rights were granted by the performers who control those  
8 compositions, or otherwise those claims are barred by the  
9 three-year statute of limitations provided for under the  
10 copyright law.

11 So we believe that we have acquired those licenses or  
12 they are not necessary.

13 THE COURT: OK. I think I have a handle on all of  
14 that.

15 I do have the parties' competing proposed discovery  
16 schedules. Obviously, I just got them so I haven't had an  
17 opportunity to study them.

18 Why are there two? What are the areas of  
19 disagreement?

20 MR. SLOTNICK: Your Honor, if I may? There are three  
21 areas of disagreement. One has to do with the date for joinder  
22 of additional parties. The second has to do with the  
23 applicability of Local Rule 33.3, and the last has to do with  
24 whether or not there should be staged discovery.

25 We are proponents of a somewhat later date with

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1 respect to the joinder of additional parties. We suggest  
2 December 15.

3 THE COURT: What paragraph is that?

4 MR. DICKSTEIN: Three.

5 MR. SLOTNICK: Three.

6 THE COURT: Well, what I have says December 15 also  
7 for the defense proposed order. Maybe I don't have the --

8 MR. ELKIN: I think for the plaintiffs, your Honor, I  
9 think it is paragraph 3 in their proposed order.

10 THE COURT: Yes. But I have one that purports to be  
11 the defendants' proposed order and it has the same date.

12 What date did you want?

13 MR. GUISBOND: October 9.

14 MR. ELKIN: We, unfortunately and inadvertently, your  
15 Honor, submitted the wrong proposal.

16 Can I hand this up, your Honor?

17 THE COURT: Please. Because I looked at some of the  
18 dates and these appear to be identical, and I was right.

19 (Pause)

20 Now, in the scheme of things, that is not an  
21 incredibly large difference. Why are the parties placing so  
22 much importance on this, Mr. Elkin?

23 MR. ELKIN: Thank you, your Honor, and I realize we  
24 don't want to tax the Court very much about this. This was a  
25 case that we believe that was brought after significant

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1 investigation by the plaintiffs. We believe -- our client is  
2 small. They've named every single entity that's possibly  
3 involved in it. What we are concerned with, your Honor, this  
4 is a case that admittedly is being sponsored by a large trade  
5 association. Our client is concerned that this is an  
6 opportunity just to fish around for it to add more and more  
7 plaintiffs.

8 That is the concern that our client had. I understand  
9 why that's happened. There is a precedent related to other  
10 cases in which our client has been involved in trade  
11 associations, and that's the concern that we have.

12 THE COURT: And was Mr. Slotnick on the other side of  
13 those cases?

14 MR. SLOTNICK: Your Honor, we would like to get some  
15 discovery, documents and interrogatory responses before we make  
16 any kind of decision. Clearly, the concern that Mr. Elkin  
17 states could be obviated by simply bringing another lawsuit on  
18 behalf of other copyright owners. We think that this is a more  
19 measured way of addressing this. Let's get some discovery now  
20 before we start really figuring out who is in and who is out of  
21 the case and, you know, where we go with depositions, which  
22 really sort of leads to the other two points that we have.

23 THE COURT: October 9 is right around the corner,  
24 Mr. Elkin. I don't think that is a sufficient amount of time.  
25 I am going to go with the December 15 date.

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1 MR. SLOTNICK: Thank you, your Honor.

2 THE COURT: OK. Next.

3 MR. SLOTNICK: The applicability of Rule 33.3  
4 regarding limitation on scope of interrogatories. There are a  
5 lot of parties to this case. Based on what we've seen from the  
6 initial disclosures from the defendants, there will be a lot of  
7 witnesses in this case, many of whom are performing artists,  
8 many of whom will take some effort to subpoena for deposition,  
9 and it is an indication to us that some of the agreements that  
10 Mr. Elkin referred to with performers are either oral or  
11 implied. We think that it will help discovery to expand on  
12 interrogatories so that we're not running out and dealing with  
13 a variety of issues that, frankly, none of us were quite  
14 certain where they are going to lead.

15 We think that a measured approach -- sending out the  
16 interrogatories, sending out document requests -- will get us a  
17 better place than just asking for names and general  
18 descriptions of documents.

19 THE COURT: Mr. Elkin.

20 MR. ELKIN: Thank you, your Honor.

21 I think the underlying policy surrounding the Local  
22 Rule 33.3 are as applicable here as they are in the vast  
23 majority of cases in this court. The witnesses -- the efforts  
24 that are going to have to be made to respond to substantive  
25 interrogatories at this stage is going to be duplicative of the

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1 testimony that is going to be provided in depositions  
2 themselves. I think the amount of time that the interrogatory  
3 process is going to entail at the beginning is not going to  
4 facilitate getting to the finish line any sooner, and I think  
5 we're going to be bogged down with written discovery.

6 There is no way to sort of dispense with the  
7 depositions in this case, which are going to be the most  
8 probative evidence for the Court. We're relying on a lot of  
9 equitable defenses here, issues with regard to how facts  
10 developed, whether licenses were created, where consents were  
11 given, and the ability and time and effort to go to research  
12 all of this to answer substantive interrogatories at the outset  
13 of the case. If they want to have contentious interrogatories  
14 down the road or if they want to have some other sort of  
15 discovery device that will cut through some of this, I  
16 understand it. But this is going to be nothing more than a  
17 huge effort, and it will get in the way of having this case  
18 progress.

19 THE COURT: Mr. Slotnick, what is the precise issue  
20 that you are trying to avoid?

21 MR. SLOTNICK: Well, there are a couple of things.

22 Number one, we have well over 200 copyrights involved.  
23 Whether or not they are the subject of one agreement, four  
24 agreements, a dozen agreements with different performers,  
25 whether those agreements are written, oral, implied, it would

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1 be nice to know at least what the basis of the defendants'  
2 defenses are before we get into depositions. We're going to be  
3 able to do some of that through documents. And if there are  
4 documents that are indicative of a grant of rights, whether or  
5 not the party who granted them had them to grant, that's one  
6 thing. But given the fact that we have a list of, I think, 45  
7 or 50 artists, starting off with Mick Jagger, it just seems to  
8 me that it would be easier to ask that question, get a written  
9 response than waiting to hear from Mick Jagger, if we ever hear  
10 from Mick Jagger, or even waiting to hear from defendants in  
11 deposition. I can't imagine anything that would take more time  
12 than preparing for and taking depositions. An answer to these  
13 questions will get us all focused on what documents there are,  
14 what documents there aren't, and what the basis for the  
15 defendants' defenses are.

16 MR. ELKIN: Your Honor, very briefly.

17 I think there is a window of insight to what  
18 Mr. Slotnick articulated which he kept referring to documents.  
19 Let them serve a document demand, and they'll get the vast  
20 majority of all of the information that they're going to seek  
21 in these interrogatories that we haven't seen yet. I suspect  
22 that once they receive all of the documents in response to  
23 their document demand, largely much if not all of the evidence  
24 that is probative here they're going to have. There may be  
25 some interstitial information that lurks in the memory of

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1 actual witnesses, but to have interrogatories propounded at a  
2 time when most of this can actually be revealed through  
3 documents I think is adding a lot of work to the process.

4 THE COURT: Why don't we proceed this way. My  
5 inclination is to have Rule 33.3 apply. And, Mr. Slotnick, if  
6 in the process you are encountering particular difficulties,  
7 then you can come back and make an application, but for now we  
8 will proceed under the rule.

9 Next.

10 MR. SLOTNICK: Well, Mr. Elkin sort of gave a preview  
11 of where the last one, which is staged discovery. If there are  
12 documents that will answer all or many of our questions, that's  
13 fantastic. We should do that first. I have no great desire to  
14 submit voluminous interrogatories at this time. And, frankly,  
15 I have no great desire to start taking depositions of witnesses  
16 immediately, or defending depositions of witnesses, when, as  
17 Mr. Elkin says, the documents are going to answer a lot of the  
18 questions.

19 I think that a staged discovery -- let's get our  
20 document requests in, let's respond to them, and then let's see  
21 what really has to be done with respect to discovery. We have  
22 23 different plaintiffs; some of them are affiliated companies.  
23 We have a significant number of defendants, and we have  
24 something like 45 nonparty witnesses that the defendants have  
25 identified. If we can eliminate even 20 percent of what will

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1 go on in discovery and depositions through document production,  
2 you know, that's time worth spent dealing with documents first.  
3 And whether it's a three-month window, a six-month window or  
4 whatever it is, it seems to us that staged discovery now makes  
5 more sense than everybody just trying to be as aggressive as  
6 they can early on.

7 THE COURT: Why don't you tell me how the discovery  
8 would be staged. What would be the stages?

9 MR. SLOTNICK: Originally we had thought that that  
10 would be document requests and interrogatories. We still may  
11 do some interrogatories but given the Court's ruling, I think  
12 those are less significant at this point. I think that  
13 document requests and whatever the issues are that come up with  
14 document requests should come first.

15 We had proposed six months before depositions take  
16 place, say, in February. If it's, you know, marginally shorter  
17 than that, we think it probably makes sense. But I think that  
18 given the number of parties, the number of documents and the  
19 number of issues that there are, you know, I'm not going to be  
20 optimistic that we're going to get all of that done in 30, 60  
21 or 90 days.

22 THE COURT: That all sounds reasonable to me,  
23 Mr. Elkin.

24 MR. ELKIN: I don't have a problem, your Honor, with  
25 respect to having document discovery precede depositions. The

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1 problem that I have with the so-called staged discovery  
2 proposal -- and I don't think that Mr. Slotnick sort of amply  
3 described an important nuance -- he proposes that no nonparty  
4 depositions take place until the party depositions have  
5 concluded. Let me attempt to explain to the Court why I think  
6 that is not workable here.

7 THE COURT: You are OK with the concept of going  
8 forward with the documents and interrogatories first before  
9 depositions?

10 MR. ELKIN: As long as there is ample time to be able  
11 to conduct depositions after that, yes, your Honor.

12 THE COURT: OK.

13 MR. ELKIN: This is a case, admittedly, where neither  
14 the plaintiffs nor, frankly, our clients have any of the core  
15 knowledge, primary knowledge with regard to what happened 10,  
16 20, 30, 40 years ago. There are -- most of the information  
17 that's going to be probative with respect to these claims, at  
18 least from our perspective on our defenses and our  
19 counterclaims, are going to be from nonparties, people who were  
20 running the Bill Graham concert business at the time, people  
21 that were negotiating with the composers, the actual artists  
22 themselves, to some extent. And to -- frankly, while we may  
23 take depositions of the plaintiffs, all they're going to  
24 basically be able to say is, yeah, I own this copyright  
25 registration, I acquired it from this company, and that is not

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1 going to really answer a question because, as I said at the  
2 outset, I don't know that copyright ownership is going to be  
3 key here.

4 The issue is whether or not licenses and consents in  
5 the course of dealing matter here. And what I would hate to  
6 have to happen is for us to go through party depositions and  
7 then we find out, much to Mr. Slotnick's correct observation,  
8 that there are going to be motions to quash the subpoenas.  
9 That's going to push out for an appreciable period of time, if  
10 the Court permits, the discovery process. If we are going to  
11 get to any sort of resolution or better assessment, I think we  
12 need to have both party and nonparty depositions take place  
13 concurrently.

14 THE COURT: So is it anticipated that all of the  
15 various artists that are involved here will have to be deposed?

16 MR. ELKIN: I don't know that all of them would have  
17 to. Your Honor, as you know, under Rule 26 we try to list all  
18 of the potential witnesses because we don't want to be  
19 precluded. I can't imagine, especially given the Court's  
20 limits on the number of depositions that can take place -- we  
21 haven't had a meet and confer yet with regard to who we want,  
22 but I think for purposes of teeing this up for your Honor, we  
23 wanted to list as many nonparty witnesses who we would possibly  
24 anticipate, but I imagine that that list is going to be cut  
25 down rather dramatically. But at this stage, for us to be

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1 precluded from taking the most important depositions, when we  
2 get to that stage I think it would be unfair to our side.

3 THE COURT: Mr. Slotnick, it appears -- I mean, if  
4 Mr. Elkin is describing this situation correctly that the  
5 people with perhaps the most relevant information are not in  
6 the caption --

7 MR. SLOTNICK: Well, they are not in the caption  
8 because they don't own anything, and so they don't have -- they  
9 don't have the right to grant the rights that Mr. Elkin thinks  
10 will be important to learn.

11 We don't have a particular problem with nonparties and  
12 parties being deposed at the same time. I would agree with  
13 Mr. Elkin that when we get a notice of deposition for the  
14 plaintiffs, you know, we will make those people available  
15 within our schedules. I do think that the people that neither  
16 of us control -- and, arguably once, you saw the list, perhaps  
17 no one controls -- you know, will be a challenge to whomever  
18 serves the subpoena first.

19 So I don't have a problem with that. I think it was  
20 the Court's rules that talk about plaintiffs or the parties'  
21 depositions going first. We don't care. We think that we can  
22 try to limit that number. We have been working together to do  
23 this. But to us the key issue here is what are the documents,  
24 what do the documents say. What Mr. Elkin seems to be  
25 suggesting is the documents aren't going to tell us very much,

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1 which, you know, we are OK with.

2 Right now we think -- we think the case is exactly  
3 where we want it to be right now. If we try to structure  
4 depositions at the same time, that's fine. Presumably, a lot  
5 of these people are not in New York; we are going to have to  
6 travel.

7 THE COURT: OK. So it sounds like we have agreement  
8 on staged discovery and the fact that the party and nonparty  
9 depositions can take place simultaneously.

10 So those are the three issues, Mr. Slotnick?

11 MR. SLOTNICK: Yes, your Honor.

12 THE COURT: So I take it the parties can get together  
13 and work out within those parameters what the schedule is?

14 MR. ELKIN: Yes, your Honor.

15 THE COURT: So then I will wait for you to submit a  
16 joint discovery order.

17 And do the parties agree on the discovery cutoff date?

18 MR. ELKIN: Yes, your Honor.

19 MR. SLOTNICK: Yes, your Honor.

20 THE COURT: So then what I'll do is we'll go ahead and  
21 schedule the subsequent status conference for on or immediately  
22 after October 21, 2016.

23 Ms. Rivera.

24 THE CLERK: October 26, 2016, at 11 a.m.

25 THE COURT: And I will also refer the case to the

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1 assigned magistrate, who is Magistrate Judge Maas, for general  
2 pretrial. So any particular discovery issues, those should be  
3 brought to Magistrate Judge Maas in the first instance.

4 And I will give the parties -- how much time do you  
5 think you will need to submit a joint order?

6 MR. SLOTNICK: Tomorrow. Sometime this week, the  
7 beginning of next.

8 THE COURT: By the end of the day tomorrow?

9 MR. ELKIN: That is fine, your Honor.

10 THE COURT: Wonderful. So we'll do that. OK.

11 Is there anything else that we need to do today?

12 MR. ELKIN: Not from defendants, your Honor.

13 MR. SLOTNICK: Your Honor, there is a counterclaim for  
14 defamation the defendants intend to move to dismiss.

15 THE COURT: OK. That is in haec verba, but I do have  
16 a premotion conference requirement. So when I get the letter,  
17 I will consider it and I will direct Mr. Elkin to respond.

18 MR. SLOTNICK: Thank you.

19 THE COURT: OK. Anything further?

20 MR. ELKIN: No, your Honor.

21 MR. SLOTNICK: No, your Honor.

22 THE COURT: Good. We are adjourned.

23 MR. ELKIN: Thank you very much, your Honor.

24 MR. SLOTNICK: Thank you, Judge.

25 - - -